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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 495

BIBB MANUFACTURING COMPANY,
Petitioner,

vs.

WILLIAM R. McCOMB, AS ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

A. O. B. SPARKS,
CHARLES M. CORK,
Counsel for Petitioner.

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BIBB MANUFACTURING COMPANY,
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vs.

WILLIAM R. McCOMB, as Administrator of the Wage and Hour Division, United States Department of Labor (Substituted in Place and Stead of L. Metcalfe Walling, Resigned).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Bibb Manufacturing Company respectfully shows:

I

Summary Statement of the Matter Involved

The findings of fact and conclusions of law of the United States District Court for the Middle District of Georgia (R. 239-251) are unofficially reported at 11 Labor Cases

Par. 63,158. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 262-265) is reported at 164 F. 2d) 179.

This proceeding was instituted by respondent to enjoin petitioner from shipping in interstate commerce goods alleged to be manufactured in violation of Section 7 (insofar as it relates to the payment of overtime) and to enjoin failure to comply with the record keeping provisions of the Fair Labor Standards Act of 1938. The violation was claimed to have arisen by petitioner's failure to pay overtime on the amount of an "attendance incentive or production bonus" as it was characterized by respondent. Petitioner's answer (R. 10-18) admitted that many of its employees who received the bonus were subject to the Act but denied that the bonus was part of the regular rate of pay on which overtime was required to be paid. If no overtime was actually due on this bonus, it was conceded there was no violation of the record keeping provisions (R. 217).

Respondent's motion for preliminary injunction was dismissed (R. 10) upon stipulation that petitioner would make payment of back wages to its employees and, pursuant to the Walsh-Healey Public Contracts Act, liquidated damages to the Secretary of Labor in the event it should finally be determined that the bonus in question should be included in the regular rate of pay in computing overtime compensation for employment subject to the Fair Labor Standards Act (R. 6-9).

After a trial before the District Judge without a jury a final judgment was entered (R. 252-3) denying a permanent injunction but ordering petitioner to make payments in accordance with the stipulation, upon findings and conclusions that the bonus was a part of the regular rate of pay. The Circuit Court of Appeals affirmed (R. 266).

The facts may be briefly summarized as follows:

Petitioner is a Georgia corporation with its principal office in the City of Macon, Bibb County, Georgia. During the period of time here involved, it operated thirteen textile mills at various points in the State of Georgia in which it employed some nine thousand employees, all of whom were engaged in the manufacture and production of cotton textiles or in processes or occupations necessary to such production. The corporation shipped and sold by far the greater part of its products in interstate commerce. Petitioner has been subject to the Federal Fair Labor Standards Act of 1938 since the adoption of that Act (R. 3).

Shortly prior to August 24, 1942, the National War Labor Board had approved increases of as much as 7½ cents per hour in the regular hourly rate of pay of employees of certain textile mills, some of which were located in the South, but which did not involve petitioner nor other textile mills in Middle Georgia (R. 80-84, 93-94).

Petitioner and certain other textile manufacturers within the Macon area of course deemed it necessary to place themselves in a competitive position with other textile mills in the South which had been granted permission to increase wages by the War Labor Board. However, in view of the necessity of promptly fulfilling large orders placed with them, they decided that it would better serve to encourage the attendance necessary to fill the orders if they would grant an increase in the regular rate of pay and also institute a bonus plan which would encourage their employees to work all of the hours (in excess of 40 per week) constituting a full shift. This decision was reached in good faith; the bonus plan was not intended as a device to avoid the overtime provisions of the Fair Labor Standards Act (Finding of Fact No. 7, R. 244). Insofar as petitioner was concerned, all of the discussions which took place among

its executive officers dealt with the idea of a bonus or incentive plan (R. 97, 102, 104, 108, 109, 115) and a bonus or incentive plan was discussed by representatives of petitioner and representatives of other Macon textile manufacturers (R. 81).

As a result of these discussions and after consultation with its attorneys, petitioner on August 24, 1942, inaugurated in all of its plants a general wage increase, a part of which consisted of the $2.00 bonus, the subject matter of this litigation. A part of the wage advance consisted in an increase in the regular rates previously paid, whether on a weekly, hourly, or piece-rate basis, the average over-all increase in such rates amounting to 2.6 cents an hour. If the $2.00 bonus were averaged over the number of hours worked in the work week by those who received it, an employee working 48 hours got, as a result of the bonus payment, 4.17 cents an hour in addition to his hourly, weekly or piece-rate, and one working 40 hours got, as a result of such payment, an additional 5 cents an hour. Petitioner's officers felt that the increase in the basic rates of pay, coupled with the bonus, would not only enable it to satisfactorily compete in the labor market, but as the bonus was an incentive bonus to be earned only by those who qualified, in the manner to be hereinafter set out, that production in its mills would be thereby increased (Findings of Fact Nos. 2 and 4, R. 240-242).

At the time of this War Labor Board approval of increased wage rates and at the time of the discussions among petitioner's officers and attorneys, the employees of all of the mills operated by petitioner, due to an increased volume of business consisting largely of orders for goods for the war effort, were upon a 48 hour week except the yard workers, cleaners and sweepers, the clerical forces in the mill offices and some few other job classifications.

Furthermore, it was at that time contemplated that all of the employees who were not then working more than 40 hours in a workweek would, within a few weeks, go upon a workweek schedule of more than 40 hours. Actually, within a few weeks, substantially all of the employees were scheduled for work in excess of 40 hours in a workweek (R. 151, Findings of Fact No. 8, R. 246).

The formal statement setting forth the terms and nature of the bonus was prepared by petitioner's attorneys. It was printed upon all payroll checks for the pay period next succeeding the adoption of the bonus and upon all payroll checks for each succeeding pay period thereafter so long as the bonus was paid. All of the employees of the company involved in the bonus plan were paid by such checks and accepted such checks whether or not a bonus was earned in the particular workweek for which payment was made.

The statement embodying the plan was as follows:

> "So far as we can now see, the company will continue to run its mills overtime for the duration of the war. For all overtime hours which you work (more than 40 in any week) you draw one and one-half times your regular hourly rate of pay.
>
> In Addition to That and Until Further Notice
>
> "(1) The company will pay an overtime bonus of $2 each week to every employee within the mill yard who is paid on an hourly or piece work basis and who works all the overtime hours his department operates for that week.
>
> "(2) If in any week no overtime hours are worked by his department, the company will nevertheless, pay that bonus to every such employee who actually works in such week the full number of hours his department operates.
>
> "These bonuses for doing a full week's work will not be paid to any employee who does not work all the

hours his department operates during that week, no matter what the reason."

(Findings of Fact No. 6, R. 243)

This $2.00 bonus was paid only to those employees who worked all of the overtime hours afforded, except where no overtime hours were afforded to such employees during any particular workweek. As stated above, some groups of employees were not afforded overtime hours until some weeks following the adoption of the plan, though all were upon overtime hours within approximately six to eight weeks thereafter (R. 154 Findings of Fact No. 8, R. 246). Thereafter, the bonus was still paid in numerous instances even though employees earning the bonus worked 40 hours or less in a workweek. Such occasions were the rare exception. There was a Christmas workweek at the Columbus, Georgia mill in which only 32 hours of work were scheduled. There was an occasion when the dam at the Taylor Mill near Reynolds, Georgia, broke when only 8 hours, were scheduled (R. 152). There were numerous instances in which a particular shift, because of breakdown or because of some bottle-neck in the manufacturing process, worked 40 hours or less. In every such instance the bonus was paid to all employees who worked the full number of hours afforded (Findings of Fact No. 8, R. 246).

Throughout the period during which the bonus plan was in effect, more than 95% of the bonuses were paid to those who worked hours in excess of 40 in the workweek, that is, to those who worked overtime hours (Findings of Fact No. 8, R. 245). Petitioner's Factory Manager estimated that 98% of all the bonuses paid were paid to those who worked overtime hours (R. 160, 161).

In order to permit all employees to work overtime or to work the full number of hours afforded, the superintendents in the various mills would generally permit an employee

to make up a lost shift by working a double shift (R. 98, 99, 110, 116, 117, 130). It was even permissible for an employee to make up two lost shifts during a workweek (R. 127).

During all of the time the bonus was in effect, time and one-half the basic rate of pay was paid to all hourly paid employees, all piece rate workers, and all non-exempt salaried employees who worked more than 40 hours in a workweek and to all engaged in Government contracts covered by the Walsh-Healey Act who worked more than 8 hours in any one day (R. 187, 149-150. See also Findings of Fact No. 10, R. 246). The hourly rates of pay of all piece rate workers and of all salaried employees who worked a fluctuating number of hours each week was arrived at in accordance with the methods prescribed by the Administrator of the Wage and Hour Division of the United States Department of Labor and overtime was paid upon the rates thus computed in the same manner as overtime was paid for hourly paid employees (R. 187). In arriving at the overtime due, however, the $2.00 bonus was in no instance included in the computation of the regular rate of pay.

The fixed or regular hourly rate of pay of all hourly paid employees, all salaried employees and all piece rate workers of appellant to whom this bonus was paid was increased upon two or more occasions subsequent to August, 1942, and prior to December 1, 1945, the date upon which the bonus plan was discontinued, there having been no change in the bonus plan during the period from August 24, 1942, until its termination. (See Condensed Statement and Abridgment of Exhibits 1, 2 and 3 of Defendant's Documentary Evidence, R. 234 et seq.)

In the applications which were made to the National War Labor Board for approval of those wage rate increases, during the period in which the bonus was paid, the bonus

plan as set forth on the back of the payroll checks was incorporated in full and the requested increases in the regular hourly rates of pay of the employees upon those two occasions were duly approved by the War Labor Board without regard to the $2.00 bonus. (Condensed Statement and Abridgment of Exhibits 1, 2 and 3 of Defendant's Documentary Evidence, R. 234 et seq.) The War Labor Board during that period of time permitted increases in so-called substandard wages up to fixed minima without Board approval, unless such increase was to be used as a basis of price relief with O.P.A., in which event approval was required. The Board would approve and did approve increases in the hourly rates of pay up to the given minimum and above the minimum upon application without taking into consideration the $2.00 bonus (Miss Courtney Carswell, Senior Rulings Attorney for Region Four, War Labor Board, R. 182, 183).

The amount of the bonus was not affected by or related to the different pay levels or scales of pay which prevailed for different job classifications or for different employees within a classification; nor was it affected by or related to the number of hours worked by an employee in any given workweek except as it was a qualification requirement that all available overtime hours be worked, or if no overtime was available, that all available hours be worked.

In no week was the bonus received by all employees of appellant and the reasonable inference from the record is that this is substantially true of each major group, class or unit of employees (R. 154-155). The approximate number who qualified for the bonus each week was 70%.

At the appellant's No. 1 Mill in Macon only one employee had earned the bonus every week after its inauguration up to a date about a year prior to the trial in February, 1946 (R. 154-5).

The following table shows the amount of overtime to which petitioner's employees would be entitled by reason of the inclusion of the bonus in the regular rate during workweeks of various numbers of hours:

Workweek	Amount of Overtime (Nearest ½ Cent)
41	.02
42	.05
43	.07
44	.09
45	.11
46	.13
47	.15
48	.17
49	.18
50	.20
51	.21
52	.23
53	.24
54	.26
55	.27
56	.29
57	.30
58	.31
59	.32
60	.33

The judgment of the District Court in this case was rendered May 15, 1946. On June 10, 1946, this Court decided in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, that the doctrine "de minimis non curat lex" is applicable in a proper case arising under Section 7(a) of the Fair Labor Standards Act; on remand the District Court held the doctrine applicable in that case (Feb. 8, 1947, 69 F. Supp. 710, certiorari dismissed Apr. 14, 1947, 67 S. Ct. 1191). In its briefs and oral argument in the Circuit Court of Appeals petitioner urged that the

doctrine should be applied in this case. The point had not been made in the District Court except as it was embraced in the general contention that petitioner was entitled to a judgment in its favor. The opinion of the Circuit Court of Appeals does not mention this point.

After the appeal and petitioner's original brief were filed, the Congress enacted the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Public Law 49, c. 52, 80th Cong., 1st Sess.). Petitioner contended in its "Supplemental and Reply Brief" in the Circuit Court of Appeals that, regardless of the merits of its other contentions, Section 9 of Part IV of that Act barred any liability on petitioner's part for back wages after May 2, 1944, the date of the War Labor Board's approval of a requested wage increase on an application which disclosed fully the bonus plan. The Board did not treat any part of the bonus payments as part of petitioner's wage rates. Petitioner urged that if the Court should agree with the District Court that the bonus should be considered part of the basis for overtime, and if the doctrine of de minimis was inapplicable, nevertheless the case should be remanded for further findings as to the effect of the War Labor Board Ruling under the Portal-to-Portal Act or the Circuit Court of Appeals should rule affirmatively that petitioner was not liable for overtime after May 2, 1944. The Court did not discuss this question in its opinion.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 7, 1947 (R. 266). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

The Questions Presented

There are three issues in this case:

1. Was the contingent attendance bonus paid an employee a part of "the regular rate at which he was employed" within the meaning of Section 7(a) of the Fair Labor Standards Act so as to require its inclusion in the base for computation of overtime, notwithstanding the statement printed on petitioner's payroll checks setting forth the terms on which the bonus could be earned.

2. If question 1 is answered in the affirmative, is the amount of overtime due each employee each week de minimis within the meaning of *Anderson* v. *Mt. Clemens Pottery Co., supra*?

3. If question 1 is answered in the affirmative, is petitioner's liability barred as a matter of law for overtime accruing on the bonus after May 2, 1944, by reason of Section 9 of Part IV of the Portal-to-Portal Act, or should the case be remanded to the District Court for findings upon which it may be concluded whether petitioner's liability is so barred?

Statutes Involved

Section 7(a) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, §7(a), 52 Stat. 1063, 29 U. S. C. 207 (a)) provides, in part:

> No employer shall * * * employ any of his employees who is engaged in commerce * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of * * * [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.

Subsections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, Sec. 15(a)(1)

and 15(a)(2), 52 Stat. 1068, 29 U. S. C. Sec. 215(a)(1) and 215(a)(2)) provide:

"Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person——

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14; * * *."

Section 17 of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, Sec. 17, 52 Stat. 1069, 29 U. S. C. Sec. 217) provides:

"The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violation of section 15."

Section 9 of Part IV of the Portal-to-Portal Act of 1947 (enacted May 14, 1947) provides:

> Reliance on Past Administrative Rulings, etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Specification of Errors to Be Urged

The United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the $2.00 bonus paid by petitioner to its employees who complied with the conditions entitling them to receive it, was a part of the "regular rate" at which they were employed for purposes of computing overtime under Section 7(a) of the Fair Labor Standards Act of 1938.

2. In failing to hold that the agreed hourly, weekly and piece rates of petitioner's employees were the only "regu-

lar rates'' at which they were employed for purposes of computing overtime under Section 7(a) of the Fair Labor Standards Act of 1938.

3. In holding that ''there was no express agreement as to the regular rate at which the employee was employed, excluding therefrom the $2.00 bonus regularly paid for a full week's work'' (R. 265), for purposes of computing overtime under Section 7(a) of the Fair Labor Standards Act of 1938.

4. In failing to hold that the statement printed on the reverse side of petitioner's payroll checks during the period in question set forth the terms of a valid contract with petitioner's employees fixing their hourly, weekly and piece rates as their ''regular rates'' of pay for purposes of computing overtime under Section 7(a) of the Fair Labor Standards Act of 1938.

5. In failing to hold that any amounts due by petitioner as overtime on the bonus in question were ''de minimis'' so as to require a judgment in favor of petitioner.

6. In failing to hold that petitioner's liability, if any, for overtime on the bonus in question was barred by Sec. 9 of Part IV of the Portal-to-Portal Act of 1947 (enacted May 14, 1947) as to bonuses paid after May 2, 1944; or alternatively, in failing to remand the case to the District Court for findings and conclusions as to whether petitioner's liability, if any, for overtime on the bonus in question was barred by Sec. 9 of Part IV of the Portal-to-Portal Act of 1947.

Reasons for Granting the Writ

This case presents important questions of Federal law which have not been, but should be, settled by this Court. The decision below on the main issue is also, we believe, in conflict with principles announced by this Court in *Walling* v. *A. H. Belo Corporation,* 316 U. S. 624, 62 S. Ct. 1223,

86 L. Ed. 1716; *Walling* v. *Halliburton Oil Wells Cementing Company,* 331 U. S. 17, 67 S. Ct. 1056, and *Williams* v. *Jacksonville Terminal Company,* 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914.

What Types of Bonus Are Part of the Regular Rate of Pay?

This Court has not decided a case in which the question was whether an amount designated and paid as a "bonus" is required to be included in the base for computing overtime under the Fair Labor Standards Act. The Administrator of the Wage and Hour Division has consistently taken the position, at least since 1941, that all bonuses are part of the regular rate of pay unless both "the payment and the amount of the bonus are solely in the discretion of the employer" (*e.g.,* a Christmas bonus not "previously promised, agreed or arranged") or unless the bonus is a flat percentage of the total weekly compensation so that it necessarily includes the overtime. *Releases* R-1548 and R-1548(a), dated Sept. 2, 1941, C.C.H. *Labor Service,* Par. 24,501.819, quoted in full 154 F. 2d 782-3; *Opinion Letter* by Donald M. Murtha, Chief Wage and Hour Section, dated May 15, 1943, respondent's exhibit 21 in this case (R. 227-229).

The Administrator has not changed his position at all by reason of the decisions of this Court in the *A. H. Belo Corporation* and *Halliburton Oil Wells Cementing Company* cases, *supra,* although it seems that an inflexible ruling that all types of bonuses paid pursuant to contractual obligation (except percentage bonuses) are necessarily a part of the regular rate is inconsistent with the refusal in those cases to adopt an artificial or inflexible definition of the term "regular rate" since the Congress had not done so. The weekly salary in those cases was contractual, but was held not to measure the regular rate of pay where the contract specified an hourly rate as the "regular rate."

Nevertheless, the Administrator's position has been sustained in this case and, in the Second Circuit, in *Walling* v. *Richmond Screw Anchor Company* (decided March 8, 1946), 154 F. 2d 780, and *Walling* v. *Garlock Packing Company* (decided Jan. 16, 1947), certiorari denied (May 5, 1947), 67 S. Ct. 1310. The Second Circuit cases were decided prior to this Court's ruling in *Halliburton Oil Wells Cementing Company* on April 14, 1947, and it is apparent the Circuit Court of Appeals thought its decisions required by rulings of this Court subsequent to the *A. H. Belo Corporation* case. In the *Richmond Screw Anchor Co.* case the Court said (pg. 784):

> "to be sure, the Supreme Court has not yet considered a bonus arrangement involving no contractual obligation; but, interpreting those decisions as best we can, their implication, coupled with the language of §7(a)(3), seems to us to require the conclusion we have reached."

In footnotes to this quotation the Court indicated that, in the exercise of its "moon-like reflecting function in interpreting Supreme Court decisions" it concluded that this Court had restricted *Belo* to cases involving an identical state of facts by its decisions in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 67 S. Ct. 1246, 89 L. Ed. 1711; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 65 S. Ct. 1242, 89 L. Ed. 1705; and *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 65 S. Ct. 11, 89 L. Ed. 29. In any event the Court of Appeals quoted Releases R-1548 and R-1548(a) in full (pgs. 782-83) and gave "appropriate weight to the administrator's official interpretation" in arriving at its conclusion.

In the *Richmond Screw Anchor Company* case it was actually unnecessary for the Court to approve in full the administrator's position relative to bonuses. In that case

there was involved a monthly bonus plan under which every employee "became entitled to the bonus payment after he had been in service for three months." Under this plan each employee received war bonds purchased with a fund set up to his credit in the amount of 10 per cent of his weekly base salary for the previous month. There was nothing contingent about the payment, as in the case at bar, and the payment was regularly made. The so-called bonus was really an addition to the base pay.

However, in the *Garlock Packing Company* case the Court says: "In Walling *v.* Richmond Screw Anchor Company, supra, we quoted and accepted an interpretative statement by the Administrator as to bonus payments, distinguishing between a bonus not previously agreed upon or arranged (such as a lump sum payment at Christmas time) and one which the employer arranges to grant with regularity." Relying upon this interpretative statement, the Court held that in computing overtime compensation due its hourly paid employees, an employer must include in the regular rate quarterly payments regularly received by the employees under a wage premium plan which allots to each employee, dependent upon the length of his service, imaginary shares of the employer corporation's stock, and arranges for the payment of dividends upon such imaginary shares pursuant to a fixed formula whenever the company's directors declare a dividend on its common stock. Relying upon the interpretative statement the Court held it immaterial that the dividends were paid quarterly, that the directors had the power to pass a bonus payment by passing a dividend, and the further power to modify, amend or withdraw the wage premium plan. Judge Swan, specially concurring, stated that he would treat the "imaginary dividend" as being a voluntary donation, like a Christmas gift, rather than a part of the regular rate of pay, but he felt constrained to concur "reluctantly" in the result "since

authoritative decisions appear to preclude so treating them." The "authoritative decisions" referred to were the *Youngerman-Reynolds Hardwood Company* and *Harnischfeger* cases cited by the majority.

If the reasoning of the *Garlock Packing Company* case is sound it would seem to follow that the Administrator's position is correct and that all bonuses paid pursuant to contract except percentage bonuses are to be included in the regular rate of pay. This case was rendered at a time when the Second Circuit Court considered that this Court had "narrowed the Belo doctrine almost to the vanishing point."

McComb v. *Utica Knitting Company* (Nov. 19, 1947), 13 Labor Cases, Par. 64,137 at page 72,190.

In spite of the subsequent reaffirmation of the Belo doctrine in the *Halliburton Oil Wells Cementing Company* decision the Second Circuit Court still feels bound to consider the Belo contract as *sui generis,* "an established gloss on the act, one which constitutes an exception to the usual rule," to employ its language in the *Utica Knitting Company* case.

It is apparent from these decisions that the Second Circuit Court of Appeals feels that the regular rate of pay must include all contractual payments unless the contract is identical with the *Belo* contract and that it would decide the *Garlock* case now as it would prior to the *Halliburton Oil Wells Cementing Company* case if the question were presented to it again, feeling constrained to do so by other decisions of this Court which did not deal at all with bonuses.

It likewise seems from the opinion of the Court below in the instant case that it so construes the decisions of this Court, although it is possible that the Court overlooked *Williams* v. *Jacksonville Terminal Company, supra,* which was cited in petitioner's original brief below. Unless the

court thought that the *Belo* and *Halliburton* decisions were, as a matter of law, confined to their exact facts, the *Jacksonville Terminal Company* decision cannot be reconciled with its statement: "Here there was no express agreement as to the regular rate at which the employee was employed, excluding therefrom the $2.00 bonus regularly paid for a full week's work." The statements printed on the back of petitioner's payroll checks (R. 243-244) coupled with the explanation of the plan published in the Company newspaper (R. 243) and the fact that the employees continued to work under the employment conditions outlined, necessarily make an express contract under the *Jacksonville Terminal Company* decision (315 U. S. 386, 397-8, 62 S. Ct. 666-7, 86 L. Ed. 914). We do not see how there can be any question under the statement on the back of the payroll checks that the bonus was agreed to be paid for overtime and not as a part of the regular rate of pay.

From the foregoing it will be seen that the Second Circuit Court of Appeals and the Fifth Circuit Court of Appeals would confine the Belo doctrine to its exact facts, notwithstanding that the principles therein laid down are applicable to bonuses as well as to guarateed weekly salaries, provided only that overtime is paid on the actual hourly regular rate of pay. We submit that the following principles laid down in the *Belo* case should be applied to bonuses of the type here involved with the result that no overtime would be due on the amount of such bonuses:

(a) The fact that an employee received an amount in addition to "his regular rate," and that his right to receive this additional amount is fixed by contract, does not in all cases require that overtime be figured on the additional amount. In *Belo* it was held that the employer need not pay overtime on the amount of the fixed salary in excess of the hourly rate.

(b) The parties to the employment relationship may stipulate that a particular measure of pay is the regular rate of pay even though it is not the sole measure of payment. In *Belo* the stipulated hourly rate was held to be the regular rate although actual payment might in some weeks be measured by another standard, the weekly guarantee.

(c) There being nothing in the Act which prevents an employer from paying more than 150% of the regular rate for overtime hours, the fact that in some weeks the employee receives more than the specified hourly rate and time and one-half that rate is not necessarily inconsistent with holding that the specified hourly rate is the regular rate where the parties have so agreed.

(d) The courts should not adopt an artificial or inflexible definition of the term "regular rate" since Congress has not done so.

The Fifth Circuit Court of Appeals in its decision of the case at bar fails to recognize the one essential fact which is the basis for the application of the foregoing principles, that there was an actual contract, entered into in good faith, fixing the regular rate of pay, and that this was the actual and genuine rate. The actuality, the genuineness, of the agreed regular rate has been the concern of this Court in all of its decisions involving overtime pay. In *Halliburton Oil*, it is said:

> "In Belo itself, the specified basic hourly rate was held to be the *actual regular rate* because, as to weeks in which employees worked more than 54½ hours, the specified rate determined the amount of compensation actually payable; as to weeks in which they worked less, the Court inferred from the collateral specification of a basic rate and provision for a legal but variable rate of overtime pay that *the guaranteed flat sum then due also contemplated both basic pay and overtime.*" (Emphasis ours.)

If the principles announced in *Belo* and *Halliburton Oil* are not to be limited only to contracts involving identical factual status, then an application of those principles to the bonus here under consideration will demonstrate, we submit, that such bonus contemplated both basic and overtime pay to the same extent as the guaranteed flat sum due employees in *Belo* and *Halliburton Oil.*

In all weeks in which overtime was worked by petitioner's employees, the $2.00 bonus became as much a part of the guaranteed but fluctuating rate of overtime as did the excess of the guaranteed amount over the compensation figured at the hourly "regular rate" in those weeks where more than 40 hours, but less than 54½ hours, were worked by any employee of A. H. Belo Corporation.

The contract here provided a regular hourly rate with time and one-half for all hours worked in excess of forty and in effect, a guaranteed weekly wage of $2.00 in excess of the weekly earnings as determined by the regular rate and the overtime rate, to those who worked all of the hours afforded. The fact that the petitioner paid the bonus even when its employees worked less than forty hours in the week, as so strongly urged by the respondent, was fully covered by the decision of this court in *Halliburton Oil.* Such employees had "a contractual right to the full guarantee however short their work week."

Recently, on November 10, 1947, this Court granted the petitions of *Bay Ridge Operating Company, Inc.* and *Huron Stevedoring Corporation* (366-367) for writs of certiorari to the Second Circuit Court of Appeals, both cases involving the question of what constitutes the regular rate of pay within the meaning of Section 7(a) of the Fair Labor Standards Act. These cases do not deal with bonuses but with the question of whether work performed outside certain scheduled hours may be compensated at rates in excess of the rates paid during the scheduled hours, and the excess

credited against overtime computed on the basis of one and one-half times the rate prevailing during the scheduled hours. If the Court should grant certiorari in the instant case, its decisions in this case would supplement the decision in Nos. 366 and 367 and do much to straighten out the confusion which apparently exists in the lower courts in arriving at the effect of previous decisions of this Court dealing with the regular rate of pay.

Petitioner submits that the decision below, the decision of the Second Circuit Court of Appeals in the *Garlock* case and expressions of the latter court in other cases are inconsistent with the principles announced in *Belo* and *Halliburton* and that this Court should decide whether these principles are to be confined to the facts of those cases.

The Application of the De Minimis Doctrine

After the decision of this Court in *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, the applicability of the *de minimis* doctrine to particular facts was considered at length by the District Court in that case (69 F. Supp. 710, February 8, 1947, certiorari dismissed, 67 S. Ct. 1191). The decision was rendered after careful consideration with the assistance of a brief submitted by the United States as *amicus curiae*. The Court held that failure to compensate for periods of less than twelve minutes a day in walking and make ready time was *de minimis* and not the basis for a suit. It is obvious that if all the employees in that case were working for the statutory minimum rate, 40 cents per hour, they would have earned 8 cents in 12 minutes or 40 cents in a five day week. The Court thus ruled, as urged by the United States, that failure to compensate for time worked was so insignificant that it would not justify the entertainment of an action where the amount involved was 40 cents a week or less.

Under no circumstances indicated by the record in the instant case has any employee been deprived of as much as 40 cents a week by failure to make overtime on the $2.00 bonus. This is shown by the table set forth in the "Summary Statement" above. The amount involved is only 33 cents in the case of a 60 hour workweek. Since almost all of petitioner's employees worked 48 hours or less during a week, the amount involved was in most instances 17 cents or less. We submit that the question of what is *de minimis* in cases such as this is an important question of Federal law which this Court should decide. The Court below did not mention this question in its opinion although it was raised and argued in both of petitioner's briefs.

Application of the Portal-to-Portal Act

The effect of the Portal-to-Portal Act on petitioner's liability, if any, in the instant case was not noticed by the Court below in its opinion, although it was vigorously urged by petitioner in its supplemental brief, filed at the earliest opportunity after the Act was enacted, that Section 9 of Part IV of the Act would relieve it of any liability to its employees after May 2, 1944, because of action of the War Labor Board on its application for general increases in the rates of pay of its employees. The application was approved May 2, 1944. Petitioner contended that if the Court could not rule as a matter of law on the record previously made that petitioner's liability was so barred, the case should be remanded to the District Court for findings on this question, and petitioner given an opportunity to plead and prove "that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States * * *." It is submitted that the case should have been given this

direction by the Court below and that its failure to do so raises an important question of Federal law which should be decided by this Court.

WHEREFORE, petitioner prays:

(a) That a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 11,776, Bibb Manufacturing Company, Appellant, *v.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor (William R. McComb, Administrator, substituted in Place and Stead of L. Metcalfe Walling, Resigned), Appellee, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as this Court may deem meet and proper.

Respectfully submitted,

BIBB MANUFACTURING COMPANY,
By A. O. B. SPARKS,
CHARLES M. CORK,
Counsel for Petitioner.

JONES, JONES & SPARKS,
Petitioner's Attorneys.

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CITATIONS

775227—48

under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether, as found by both courts below, a $2.00 weekly "attendance bonus," granted by petitioner to its employees as part of a wage increase, is a part of the regular rate of pay within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provision of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201, is as follows:

> Sec. 7 (a). No employer shall * * * employ any of his employees [who are subject to the Act] * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of * * * [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner operates thirteen textile mills and employs approximately 9,000 employees who are admittedly subject to the Fair Labor Standards Act (R. 3, 11). In August 1942 petitioner, in order to retain its employees in a highly competitive labor market, found it necessary to meet a general wage increase of 7½ cents per hour in the industry (Fdg. 2, R. 241). As a result, a

direct wage increase averaging 2.6 cents per hour was agreed upon, and the balance of the necessary increase was supplied by the payment "as a part of the company's wage advance" of a bonus of $2.00 per week to each employee who worked all the hours required of him in any week (Fdg. 3, R. 242). The bonus, which was devised to discourage absenteeism and thereby stimulate increased production (Fdg. 4, R. 242–243), was termed by company officials a "bonus for a full week's work," and was so described in the initial announcement to the employees as well as in subsequent announcements of wage increases (Fdg. 6, R. 243; R. 25, 30–31, 73–77). Although, at the suggestion of the company's attorneys, an indorsement on the reverse side of each employee's pay check referred to an "overtime bonus," this indorsement also stated that the bonus would be paid even "in any week [when] no overtime hours are worked by his department" provided that the employee "actually works in such week the full number of hours his department operates" (R. 12–13, 85–86; Fdg. 6, R. 243–244). The bonus was in fact paid in non-overtime workweeks when only 40, 38, 32, 24 or 8 hours were worked if only that number of hours was required in that week (R. 55–59, 98, 109, 131, 135; Fdg. 8, R. 245). The district court specifically found as a fact that the bonus was not promulgated as an overtime bonus but as a bonus for doing full-time work (Fdg. 6,

R. 244), and that it became a part of the normal and regular compensation of an employee who worked the full weekly hours required in weeks when no overtime was worked as well as in overtime weeks (Fdg. 8, R. 245).

Petitioner treated the bonus as wages for the purpose of computing social security taxes, unemployment taxes, and withholding taxes (Fdg. 5, R. 243). It did not, however, include the bonus as a part of the employees' regular rates of pay, or reflect it in any way in its overtime payments (Fdg. 10, R. 246–247).

The Administrator brought this suit in 1945 to enjoin petitioner's failure to include the bonus in computing the regular rate of pay and to enjoin the shipment in commerce of goods produced by employees who had not received overtime compensation based on a rate which included the bonus (R. 2). A motion for preliminary injunction, which if granted would have prevented petitioner from shipping in commerce goods then in its possession, was filed contemporaneously with the complaint (R. 7). This motion was dismissed upon the stipulation of the parties that "If, on the final determination of this case, the Court sustains the plaintiff's position * * * (a) The defendant hereby formally agrees to make payment to its affected employees of all back wages due * * *" (R. 7–8). After trial the district court found that "the bonus plan was a contractual arrangement

under which the employees became legally entitled to the $2.00 payment by working the required weekly hours," that the "bonus was intended to be and was in fact, a part of the general increase in wages," and that from its inception "it was a normal and regular part of the employees' weekly compensation, being paid without regard to whether the week was an overtime or a non-overtime week" (R. 243, 244, 247). The court, however, concluded that an injunction was not needed because the bonus plan had been discontinued. It denied the injunction but ordered the company to pay the back wages due under the stipulation (R. 251). An appeal was taken by the company.

The circuit court of appeals affirmed the judgment, stating that "the evidence taken as a whole fully supports the court's finding that there was no contractual agreement between appellant and its employees that the bonus was an overtime bonus and not a part of 'the regular weekly rate'" (R. 264). "Indeed," said the court, "we doubt whether a finding the other way could have been sustained" (*Ibid.*). "It, therefore, is quite plain," concluded the court, "that *Belo's* case, on which appellant relies, is without application here" (*Ibid.*).

ARGUMENT

The holding of both courts below that the attendance bonus should have been included as an element of the regular rate of pay follows the decisions of this Court and accords with those of

the circuit courts of appeals. The bonus payments here were made pursuant to contract in lieu of a wage increase. They were "payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424), and therefore clearly "a part of the normal weekly income" and "an ingredient of the statutory regular rate." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 431. See also *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. C. A. 2), certiorari denied, 328 U. S. 870; *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44 (C. C. A. 2), certiorari denied, 331 U. S. 820; *Walling* v. *Wall Wire Products Co.*, 161 F. 2d 470 (C. C. A. 6), certiorari denied, 331 U. S. 828; *Walling* v. *Stone*, 131 F. 2d 461 (C. C. A. 7).

Petitioner's contention that the bonus should be regarded as additional overtime compensation rather than as part of the basic rate is predicated upon the indorsement on the pay checks which referred to the additional weekly payment as an overtime bonus, and upon the erroneous assumption that under *Walling* v. *Belo Corp.*, 316 U. S. 624, the mere denomination of a payment as "overtime" fixes its character.[1] Both courts be-

[1] It is significant that the very court of appeals which decided the *Belo* case found it "quite plain that *Belo's* case * * * is without application here" (R. 264).

low found, however, in view of other language in the indorsement and numerous other notices sent to employees, that the isolated statement in the indorsement was not the equivalent of a contractual agreement that the bonus was for overtime (R. 244, 264). The fact that the bonus was paid for normal non-overtime hours of work establishes that it was a part of the regular rate, contract terminology to the contrary notwithstanding. See *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419; *Walling* v. *Harnischfeger Corp., supra; 149 Madison Ave. Corp.* v. *Asselta,* 331 U. S. 199, 205, 209–210.[2]

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[2] The petition (pp. 22–23) raises two subsidiary points (based on the "*de minimis*" doctrine and the Portal-to-Portal Act of May 14, 1947, Pub. Law 49, 80th Cong., 1st Sess.) which, although fully briefed and argued in the court below, apparently were not considered of sufficient consequence to require comment. Even if it be assumed that petitioner is not estopped from raising these points in view of its having obtained a withdrawal of the motion for preliminary injunction in return for its agreement to pay back wages in the event the bonus was held part of the regular rate (see *Davis* v. *Wakelee,* 156 U. S. 680; *Penny Stores* v. *Mitchell,* 59 F. 2d 789 (statutory three-judge court, S. D. Miss.)), its contentions on both points are groundless.

In support of its "*de minimis*" argument, petitioner relies on *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, 692, in which this Court stated that the "*de minimis*" doctrine might apply to the few seconds or minutes spent in preproduction activities where precise calculation is not easily obtainable. This clearly has no application to the determination of the regular rate, which may be ascertained as a "matter of mathematical computation." *Walling* v. *Youngerman-*

CONCLUSION

The decision below is plainly correct. The petition presents no questions of substance not

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Reynolds Hardwood Co., supra, p. 425. Since the bonus here in question was the greater part of the wage increase, petitioner is in the peculiar position of contending that the greater portion of the increase paid as a bonus should be considered "*de minimis*," notwithstanding the fact that it recognized that the smaller portion should be included in the regular rate.

Petitioner, having failed to include the bonus in the regular rate since the inception of the plan in 1942, now suggests that under Section 9 of the Portal-to-Portal Act such failure was "in good faith in conformity with and in reliance on" a War Labor Board approval of a wage increase in 1944. Since petitioner's practices in this respect antedated the War Labor Board action and were unchanged thereafter, the claimed defense under the Portal-to-Portal Act is unavailable. Furthermore, petitioner nowhere suggests that the Board issued "any administrative regulation, order, ruling, approval, or interpretation" or had "any administrative practice or enforcement policy," which purported to pass on the question whether the bonus was part of the "regular rate" under the Fair Labor Standards Act. As appears from the undisputed evidence in the record and the findings of the trial court, "no approval was in fact given to said plan" by the Board (Fdg. 14, R. 248; R. 174) and "even if the Board had attempted to approve said plan, it was in fact without authority to do so" (R. 248; see War Labor Disputes Act of June 25, 1943, 57 Stat. 163, Sec. 7 (a) (2), 50 U. S. C., App., Supp. V, 1507 (a) (2); Stabilization Act of 1942, 56 Stat. 765, Sec. 4, 50 U. S. C., App., Supp. V, 964; Executive Order 9250, 7 F. R. 7871, as amended by Executive Order 9381, 8 F. R. 13083). Where, as here, the defenses provided by the Portal-to-Portal Act are patently inapplicable, there is no occasion for remand to permit their presentation. Cf. *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, petition for rehearing (request for remand under the Portal-to-Portal Act) denied, October 13, 1947.

already settled by this Court and should, therefore, be denied.

Respectfully submitted.

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